Supreme Court, U.S.
FILED

04 189 MAY 27 2004

OFFICE OF THE CLERK

No. 04-

In the Supreme Court of the United States

MARY RIZZO,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court for the State of Michigan

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. IS THE MICHIGAN COURT OF APPEALS' RULING THAT THE PRESENCE OF ANY AMOUNT OF ALCOHOL ON A PERSON'S BREATH MAKES IT LIKELY THAT AN INDIVIDUAL CONSUMED MORE THAN THE LEGAL AMOUNT OF ALCOHOL IS CLEARLY ERRONEOUS AND CONTRARY TO DECISIONS IN CASES FROM OTHER JURISDICTIONS?

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OPINION BELOW

The opinion of the Michigan Supreme Court denying leave to appeal is dated February 27, 2004 and is reprinted at App. 1a. The Court of Appeals order denying leave to appeal is dated May 23, 2003 and appears at App. 2a. The Oakland County Circuit Court order denying leave to appeal appears at App. 3a and is dated September 11, 2002. The district court order denying the motion to suppress after remand was dated December 4, 2001 and appears at App. 4a.

The Court of Appeals decision reversing the original suppression order is dated December 29, 2000 and appears at App. 5a. *People v Rizzo*, 243 Mich App 151, 622 NW2d 319 (2000). The District Court hearinggranting the suppression was held on December 15, 1998, and the transcript of same appears beginning at App. 16a.

JURISDICTION

The decision of the Michigan Supreme Court denying the Petitioner's Application for Leave to Appeal is dated February 27, 2004. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

US Const Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF CASE

On August 28, 1998, at 12:40 a.m., Michigan State Trooper Dennis Dillard stopped the Appellant's vehicle on the freeway because Appellant's vehicle had a broken taillight (See 12/15/98 Motion to Suppress Transcript, p. 24). The officer questioned Appellant concerning the broken taillight, and Appellant responded with a lucid, coherent, and logical explanation of how the taillight had become broken (Tr, p. 8). During this conversation, it did not appear to the officer that the Appellant was intoxicated (Tr. 22-24). She was speaking in an ordinary tone of voice and her responses were appropriate (T 22-25). The officer did not question Ms. Rizzo regarding her consumption of alcohol, time periods involved since having the drink, or the source of the odor. The officer also never offered any testimony suggesting that the Ms. Rizzo's driving was in any way inadequate.

The officer testified that he ordered the Appellant out of her vehicle to perform field sobriety tests because he smelled an intoxicant on her breath (Tr., 24-25). When Appellant was unable to perform the tests to the officer's satisfaction, she had to take the Personal Breathalyzer Test (PBT). As a result of that test, the officer arrested Appellant for Operating a Motor Vehicle Under the Influence of Intoxicants (OUIL) and transported her to the police station where she submitted to a Datamaster Chemical test. That test, administered one hour after the traffic stop, indicated Appellant's blood alcohol level was 0.12.

District Court Opinion:

On December 15, 1998, the 46th District Court dismissed the OUIL charge, noting:

> Just a bad smell without asking any questions like where are you coming from a bar? Did you have any alcohol? Without any of that and without bad driving and without the fumbling that you sometimes see and without testifying—I didn't hear there was blood shot eyes; I didn't hear anything else as typically testified to for justifying giving the field sobriety test, and if there's no justification for giving the field sobriety test there's no justification for the PBT, and there's no justification for the breathalyzer. Motion is granted. (See December 15, 1998, Tr. 53) (App. 50a).

Circuit Court Opinion:

The Oakland County Circuit Court affirmed the District Court's decision in an Opinion and Order dated April 28, 1999 (Oakland County Circuit Court Opinion and Order, April 28, 1999).

The Circuit Court posed the question of "whether the smell of intoxicants alone is sufficient to give a peace officer reasonable cause to ask a person to exit his or her vehicle and administer field sobriety tests and a PBT." *Id.*, p. 2. The Circuit Court based its decision on the fact that "There was no other sign of intoxication" and determined that "The smell of intoxicants alone is not sufficient probable cause to administer the field sobriety tests and PBT." *Id.*, p. 4.

Michigan Court of Appeals' Opinion:

On October 3, 2000, the Court of Appeals issued a published opinion stating that the mere odor of alcohol on the Appellant's breath without more constituted sufficient cause that she was operating a motor vehicle under the influence of

alcohol to merit ordering Ms. Rizzo to submit to a PBT.[1]

Ms. Rizzo applied for leave to appeal arguing that leave to appeal should be granted because the Court of Appeals' decision is in conflict with decisions of Florida, Minnesota and Ohio appellate courts. These cases hold that such an odor standing alone is *not* reasonable suspicion. These cases are also discussed in the Petitioner's petition to this Court.

An appeal to the Supreme Court was filed one day late based on an error in counsel's office.

Remand Proceedings.

On remand, Ms. Rizzo again moved to suppress the evidence. Then Ms. Rizzo argued that the Court of Appeals opinion left open the questions of:

- whether the naked odor of alcohol standing alone constituted probable cause for detention or arrest;

- whether a field sobriety test administered in this matter was reasonably reliable and/or certified by the appropriate national authorities.

Ms. Rizzo lost this motion in the attached ruling and appealed them to the circuit court.

The Second Appeal

On appeal to the circuit court, the court denied leave to appeal on the merits. On May 23, 2003, the Michigan Court

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[1] *People v. Rizzo*, 243 Mich App 151, 622 NW2d 319 (2000).

of Appeals denied leave to appeal for "lack of merit in the grounds presented."

The Michigan Supreme Court denied leave to appeal on February 27, 2004 for want of merit in the grounds presented.

This Petition follows.

REASONS FOR GRANTING WRIT

I. THE MICHIGAN COURT OF APPEALS' DECISION THAT THE PRESENCE OF ANY AMOUNT OF ALCOHOL ON A PERSON'S BREATH MAKES IT LIKELY THAT AN INDIVIDUAL CONSUMED MORE THAN THE LEGAL AMOUNT OF ALCOHOL IS CLEARLY ERRONEOUS AND CONTRARY TO DECISIONS IN CASES FROM OTHER JURISDICTIONS.

All lower courts which have heard this dispute have held that the naked presence of alcohol on an individual's breath does not make it likely that the individual consumed more than the legal amount of alcohol to operate a motor vehicle. Rejecting the rulings of numerous state courts to the contrary, the Michigan Court of Appeals *in a published* decision has given the green light to police to treat the millions of Michigan motorists who consume a drink at dinner as criminals. Further, the decision fails to give appropriate deference to the fact finding powers of lower courts. This decision was a front page Michigan Lawyers Weekly story and was picked up by an AP press feed that was distributed throughout Michigan and beyond.[2] Unless this Court agrees to hear this matter, the ruling in *People v. Rizzo* will be

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[2]A search through the AP wire-service database (www.ap.org) showed that a summary of this case reporting that the smell of alcohol was sufficient appeared in numerous news articles both in Michigan and outside the state. Many of these documents were part of the lower court record and will be provided to this Court.

treated as a green light by law enforcement to engage in precisely the conduct which the undersigned suggests.[3]

The Court of Appeals' opinion states the facts involved as follows:

> In this case, we consider whether a police officer may request a motorist to perform roadside sobriety tests based solely on the strong odor of intoxicants apparent on the motorist's breath. We conclude that such an odor, standing alone, is sufficient to provide a police officer with a reasonable, articulable, and particular suspicion that the motorist has consumed intoxicating liquor, which may have affected the motorist's ability to operate a motor vehicle.
>
> Accordingly, we reverse the decisions of the lower courts suppressing the relevant evidence and dismissing the charges against defendant.

On August 28, 1998, at approximately 12:40 a.m., Michigan State Police Trooper Dennis Dillard was on

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[3] Ms. Rizzo's position that *Rizzo* will be interpreted in this broad fashion is not just defense hyperbole. One of the leading commentators on Michigan criminal law has offered this broad reading of *Rizzo*. T. Baughman, Gillespie's Michigan Criminal law and Procedure, §5:23.50 ("Assuming a lawful stop of the automobile, a police officer who smells the odor of intoxicants on the defendant's breath has a reasonable suspicion that the driver has violated the law by driving while intoxicated or impaired. Based on the odor, the officer may direct the individual stopped to perform roadside sobriety tests"). Note, that Mr. Baughman's interpretation does not treat the odor as one factor, but interprets *Rizzo* as creating an absolute rule.

highway patrol near the Southfield Freeway and Lodge Freeway interchange, driving a fully marked patrol car. He observed a blue Geo Prizm with a broken rear taillight, which was showing white light to the rear. Dillard decided to stop the vehicle for a defective equipment violation and pulled it over to the side of the freeway.

Dillard approached the vehicle and spoke with defendant, who was the vehicle's driver and sole occupant, through the open driver's side window. Dillard requested defendant's driver's license, registration and proof of insurance, which she produced. He explained that he had stopped her vehicle because of the broken taillight, and she volunteered that the taillight had been broken two weeks previously, when the car was parked in front of her brother's house. During this conversation, Dillard detected a strong odor of intoxicants on defendant's breath. He therefore asked her to exit the vehicle and perform roadside sobriety tests, in order to determine whether she was intoxicated. It is uncontested that Dillard asked defendant to perform the roadside sobriety tests based solely on the strong odor of intoxicants on her breath, and not because she was driving or acting in any way that suggested intoxication.

As the Court of Appeals noted in a footnote, the officer had no belief beyond this that Ms. Rizzo was operating under the influence of alcohol. *Id* at n.5 ("Dillard admitted at the suppression hearing that he could not determine, based solely on the strong odor of intoxicants on defendant's breath, whether her blood alcohol content exceeded the legal limits"). That same panel conceded that the officer did not have a reasonable suspicion that Ms. Rizzo was intoxicated or had passed the breath alcohol limit. The Court treated the presence of any alcohol as proxy for intoxication.

In upholding the search, the Court stressed several points:

- That brief stops based on reasonable suspicion of a crime are permissible even though the same facts would not be sufficient to warrant a full arrest;

- That the basis for such stops should be reviewed in a common sensical fashion.

The Court therefore concluded by holding:

Defendant next argues that the odor of intoxicants on a motorist's breath does not necessarily mean that the motorist's blood alcohol content exceeds legal limits. While we agree with defendant on this point, we nevertheless hold that such an odor may give rise to a reasonable suspicion that the motorist has recently consumed intoxicating liquor, which may have affected his or her ability to operate a motor vehicle. A police officer need not suspect that a motorist's blood alcohol content is above or below a certain numerical limit before conducting roadside sobriety tests. Rather, he must merely have a reasonable suspicion that the motorist has consumed intoxicating liquor, which may have affected the motorist's ability to operate a motor vehicle. In order to confirm or dispel such reasonable suspicions, we hold that a police officer may instruct a motorist to perform roadside sobriety tests. Defendant next argues that the police officer could not have developed a reasonable suspicion that she was operating a motor vehicle while under the influence of intoxicating liquor unless he visibly observed indications that she was driving while intoxicated, such as swerving, crossing lane markers, or other similar conduct. To support her contention,

> defendant relies on the language of the OUIL/UBAL statute, MCL 257.625(1); MSA 9.2325(1), and the criminal jury instructions, CJI2d 15.3. Defendant is incorrect. A motorist may be convicted of OUIL/UBAL if he or she *either* operated a motor vehicle while under the influence of intoxicating liquor, *or* if he or she operated the vehicle with an unlawful blood alcohol level. MCL 257.625(1); MSA 9.2325(1); CJI2d 15.3. Further, a ""defendant may be convicted of OUIL even if he is observed driving in a normal fashion."" *People v. Crawford*, 187 Mich App 344, 350; 467 NW2d 818 (1991), citing *People v. Walters*, 160 Mich App 396, 402-403; 407 NW2d 662 (1987). Therefore, defendant's argument fails.

In reaching this conclusion, the Court ignored its own common sensical interpretation of reasonable suspicion. While the Court conceded that an individual may legally operate a vehicle following the consumption of alcohol, the Court's opinion has opened the door for police officers in their sole discretion to treat them as criminals.

In upholding the search, the Court cited extensively to the portions of court decisions which held that such a detention can take place on less than probable cause.[4] The Court,

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[4] While this case focuses (in part) on the demarcation between probable cause and reasonable suspicion, this Court should not treat stops or detentions based on reasonable suspicion as non-invasive or not humiliating. As Justice Scalia has noted:

> Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.' Terry v. Ohio, 392

however, glossed over the portions of these decisions which held that a mere hunch or suspicion by a police officer is not sufficient. *Cf Reid v. Georgia*, 448 U.S. 438, 100 S Ct 2752, 65 LEd 2d 890 (1980) (reasonable suspicion requires something more than an "inchoate and unparticularized suspicion or "hunch"). An officer must be able to point to specific and articulable facts to support a finding of reasonable suspicion; an inchoate and unparticularized suspicion or hunch is insufficient. *Terry v. Ohio*, 392 US 1, 21, 88 S Ct 1868, 20 L Ed 2d 889 (1968); *United States v. Wardlow*, 506 US 976, 113 S Ct 469, 121 L Ed 2d 376 (2000) (stating that reasonable suspicion, which is "less demanding than probable cause," requires an officer to articulate more than an "unparticularized suspicion or 'hunch'"); *United States v. Kerr*, 817 F2d 1384, 1387 (9th Cir 1987) (emphasizing that even for a *Terry* stop, "hunches alone will not withstand constitutional scrutiny").[5]

Further, the Court of Appeals opinion ignores the fundamental principle of law that people are presumed to ordinarily follow the law. *Jacobson v. United States*, 503 US

U.S. 1, 24-25, 20 LEd 2d 889, 88 S Ct 1868 (1968).

Wyoming v. Houghton, 526 US 295, 119 S Ct 1297, 143 L Ed 2d 408 (1999) (Scalia J. concurring).

[5] While the Court of Appeals took great pains to stress how lower courts should exercise care to not engage in overly detailed reviews of a police officer's reasonable cause claims (*Id.* at 157), the Court failed to tender the same respect to basic principles of Fourth Amendment jurisprudence, *viz*: that probable cause is the general rule and that the *Terry* reasonable suspicion exception should be narrow construed. *United State v. Place*, 462 U.S. 696, 714 (1983) (Brennan, J., concurring in result).

540, 550, 112 S Ct 1535, 118 L Ed 2d 174 (1992). In *Jacobson*, this Court roundly rejected the Government's argument that the Court could infer that the purchasers of legal but indecent magazines depicting underage males would be more likely to purchase illegal child pornography. The Court found that such an inference ignored the fundamental principle that persons are presumed to obey the law:

> ... there is a common understanding that most people obey the law even when they disapprove of it. This obedience may reflect a generalized respect for legality or the fear of prosecution, but for whatever reason, the law's prohibitions are matters of consequence.

Similarly, it is utterly unreasonable to infer that persons who consume some alcohol are likely (whether formulated as reasonable suspicion or probable cause) to consume more than the legal limit. In this case, there was nothing which permitted the officer to "distinguish the class of suspects from the general public." *Cf United States v. Powell*, 2000 US App LEXIS 6131 (CA 6, 2001).[6]

In permitting the police to conclude from the presence of any alcohol on an individuals' breath that it is somehow likely

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[6] In a footnote, the Court of Appeals attempted to bolster its position by relying on the officer's testimony that Ms. Rizzo failed a field sobriety test. This position is circular. A field sobriety test is not reliable as to whether the person has consumed more than the legal limit of alcohol. It is only legal proof that some alcohol has been consumed. *See People v. Berger*, 217 Mich 213, 551 NW2d 421 (1996). Moreover, the Court of Appeals recognizes that reasonable suspicion was required to make Ms. Rizzo submit to the field test in the first place.

that the individual consumed more than the legal driving limit has no logical basis and has been rejected by numerous other courts. Florida has held that the mere odor of alcohol on an individual's breath is not sufficient grounds to believe that an individual may have operated a vehicle under the influence of alcohol. *State v. Henderson*, 719 So2d 1223 (Fla App 5th Dist 1998) (mere odor of alcohol does not constitute probable cause that individual is over the legal limit); *State v. Floyd*, 510 So2d 1180 (Fla App 46th Dist 1987) (same). Minnesota is in accord. *See Reis v. Commissioner*, 358 NW2d 740 (Minn Ct App, 1984); *Nusbaum v. Commissioner*, 1988 Minn App LEXIS 103, 1998 WL 4286 (Minn App, 1988) (Unpublished) (App. 14a); *Commissioner v. Shewchuk*, 412 NW2d 434 (Minn App, 1987).

In *Reis*, the Minnesota Commissioner of Motor Vehicles challenged a trial court determination that a deputy lacked probable cause in a somewhat similar fact situation. The deputy testified that the driver was alert, coherent and cooperative, even though the deputy did detect a moderate odor of alcohol and somewhat bloodshot eyes; his slurred speech was discounted by the deputy because the driver had a swollen lip from his accident. The driver admitted he had been drinking earlier in the evening, and had not been watching the road, with which he was familiar. The trial court, examining the totality of the circumstances, concluded the deputy lacked sufficient probable cause to invoke the implied consent law. The Minnesota court affirmed, concluding again that in a close case, we should defer to the trial court. Id. at 741.

Ohio is in accord. In *State v. Downen*, 2000 Ohio App LEXIS 300, 2000 WL 126616 (2000), the Court reversed a trial court determination that the mere presence of the alcohol constituted reasonable suspicion to that an individual had been

operating a motor vehicle while under the influence of alcohol. The Court also rejected an officer's attempt to push the matter over the threshold by using such "customary adjectives" as "pervasive" or "strong."

The *Downen* the Court found that the smell of alcohol constituted no more a showing of drinking to excess than a showing that an individual had just had a meal was evidence of gluttony.

Similarly, the Ohio Court of Appeals recognized in *State v. Taylor*, 3 Ohio App 3d 197, 444 NE2d 481 (1981):

> The mere odor of alcohol about a driver's person, not even characterized by such customary adjectives as "pervasive" or "strong," may be indicia of alcohol ingestion, but is no more a probable indication of intoxication than eating a meal is of gluttony. For better or worse, the law prohibits drunken driving, not driving after a drink.

These principals were reaffirmed in *State v. Bunkley*, 2002 WL 417909. While *Bunkley* is not directly on point, the Court noted:

> Asking a driver to perform field sobriety tests is a greater invasion of an individual's liberty interest than the initial stop. *State v. Evans* (1998), 127 Ohio App 3d 56, 62, 711 NE2d 761, 765. In order to justify this greater invasion of Bunkley's rights, the police officer must demonstrate specific and articulable facts which, when considered with the rational inferences therefrom, would, in light of the totality of the circumstances, justify a reasonable suspicion that the individual who is stopped was driving under the

influence of alcohol. *State v. Blackburn* (1996), 115 Ohio App 3d 678, 681, 685 NE2d 1327, 1328, citing *State v. Bobo* (1988), 37 Ohio App 3d 177, 524 NE2d 489.

Ohio's appellate courts are repeatedly asked to address whether a police officer had a reasonable suspicion to conduct a field sobriety test in a particular set of circumstances. The Eleventh District recently summarized many of these decisions in *Evans, supra*. The *Evans* court noted courts look to a variety of factors when making this determination.

> "Without citing the numerous cases which have been canvassed, it may be said these factors include, but are not limited to (1) the time and day of the stop (Friday or Saturday night as opposed to, e.g., Tuesday morning); (2) the location of the stop (whether near establishments selling alcohol); (3) any indicia of erratic driving before the stop that may indicate a lack of coordination (speeding, weaving, unusual braking, etc.); (4) whether there is a cognizable report that the driver may be intoxicated; (5) the condition of the suspect's eyes (bloodshot, glassy, glazed, etc.); (6) impairments of the suspect's ability to speak (slurred speech, overly deliberate speech, etc.); (7) the odor of alcohol coming from the interior of the car, or, more significantly, on the suspect's person or breath; (8) the intensity of that odor, as described by the officer ('very strong,' 'strong,' 'moderate,' 'slight,' etc.); (9) the suspect's demeanor (belligerent,

> uncooperative, etc.); (10) any actions by the suspect after the stop that might indicate a lack of coordination (dropping keys, falling over, fumbling for a wallet, etc.); and (11) the suspect's admission of alcohol consumption, the number of drinks had, and the amount of time in which they were consumed, if given. All of these factors, together with the officer's previous experience in dealing with drunken drivers, may be taken into account by a reviewing court in determining whether the officer acted reasonably. No single factor is determinative." *Id.* at 63, 711 NE2d at 766, footnote 2.

In this case, the Court of Appeals held that one factor, i.e. the smell of alcohol standing alone, constituted sufficient reasonable suspicion to demand the Petitioner's submission to a preliminary breath test. Drinking and driving is not a crime in this state, only drinking and driving beyond a specified amount of alcohol or where a person's abilities are impaired. The decision of the Court of Appeals means that a person who has a glass of wine with dinner can be treated as a criminal without any showing of impairment or excessive consumption. This is a very important question of law which should be subject to plenary review.

The question involved in this case is not a pure question of law, it is a question of law and fact. As the above cases all demonstrate (and expressly state), in such a situation, deference must be given to the trial court. The Court of Appeals' statement to the contrary is clearly erroneous.

Certiorari should be granted.

RELIEF REQUESTED

For all of the reasons stated above, Petitioner requests this Court issue a writ of certiorari or alternatively remand this matter for further proceedings.

Respectfully submitted,

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APPENDIX A

MICHIGAN SUPREME COURT

Case No. 124264

[Filed February 27, 2004]

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

MARY RIZZO,
Defendant-Appellant.

ORDER DENYING LEAVE TO APPEAL (SECOND APPEAL)

On order of the Court, the application for leave to appeal the May 23, 2003 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

/s/
Corbin R. Davis

February 27, 2004

APPENDIX B

COURT OF APPEALS ORDER (SECOND APPEAL)

IN THE MICHIGAN COURT OF APPEALS

Docket # 247005

LC #2002-007559-AR

ORDER

People	)
	)
v.	)
	)
Mary Rizzo	)
	)

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

This Court retains no further jurisdiction.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on May 23, 2003.

/s/Sandra Schultz Mengel
Chief Clerk

APPENDIX C

Circuit Court Order (Second Appeal)
STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

People of the State of Michigan,)
Plaintiff-Appellant,)
)
v.)
)
Mary Nancy Rizzo,)
Defendant-Appellee.)
)

ORDER DENYING LEAVE TO APPEAL

At a session of said Court, ehld in the Courthosue Tower, on this 11th day of September, 2002.

PRESENT: HON. DENISE LANGFORD MORRIS

The Defendant's Application for leave to appeal is DENIED. This Court is controlled by the adverse Court of Appeals decision previously rendered in this same case.

Dennis Langford Morris

APPENDIX D

District Court Order (Second Appeal)
STATE OF MICHIGAN
IN THE 46th DISTRICT COURT
FOR THE COUNTY OF OAKLAND

People of the State of Michigan,)
Plaintiff-Appellant,)
)
v.)
)
Mary Nancy Rizzo,)
Defendant-Appellee.)
)

ORDER DENYING MOTION
TO SUPPRESS EVIDENCE

At a session of said Court, held in the City of Southfield, County of Oakland, State of Michigan on December 4, 2001.

HON. SUSAN M. MOSSIEV
District Court Judge

IT IS HEREBY ORDERED that the Defendant's Motion to Suppress the Evidence is Denied for the reasons set forth on the record;

IT IS FURTHER ORDERED that all further proceedings in this matter be STAYED to allow the Defendant ot file an Interlocutory Appeal.

_____

HON. SUSAN MOSSIEV

APPENDIX E

Court of Appeals Opinion (First Appeal)
STATE OF MICHIGAN
IN THE COURT OF APPEALS

People of the State of Michigan,)
Plaintiff-Appellant,)
)
v.)
)
Mary Nancy Rizzo,)
Defendant-Appellee.)
)

Docket No. 219360.
Submitted Aug. 2, 2000, at Detroit.
Decided Nov. 3, 2000, at 9:00 a.m.
Released for Publication Dec. 28, 2000.

SMOLENSKI, P.J.

In this case, we consider whether a police officer may request a motorist to perform roadside sobriety tests solely on the basis of a strong odor of intoxicants apparent on the motorist's breath. We conclude that such an odor, standing alone, is sufficient to provide a police officer with a reasonable, articulable, and particular suspicion that the motorist has consumed intoxicating liquor, which may have affected the motorist's ability to operate a motor vehicle. Accordingly, we reverse the decisions of the lower courts

suppressing the relevant evidence and dismissing the charges against defendant.

On August 28, 1998, at approximately 12:40 a.m., Michigan State Police Trooper Dennis Dillard was on highway patrol near the Southfield Freeway and Lodge Freeway interchange, driving a fully marked patrol car. He observed a blue Geo Prizm with a broken rear taillight, which was showing white light to the rear. Dillard decided to stop the vehicle for a defective equipment violation and pulled it over to the side of the freeway.

Dillard approached the vehicle and spoke with defendant, who was the vehicle's driver and sole occupant, through the open driver's side window. Dillard requested defendant's driver's license, registration, and proof of insurance, which she produced. He explained that he had stopped her vehicle because of the broken taillight, and she volunteered that the taillight had been broken two weeks previously, when the car was parked in front of her brother's house. During this conversation, Dillard detected a strong odor of intoxicants on defendant's breath. He therefore asked her to get out of the vehicle and perform roadside sobriety tests to determine whether she was intoxicated. It is uncontested that Dillard asked defendant to perform the roadside sobriety tests solely on the basis of the strong odor of intoxicants on her breath, and not because she was driving or acting in any way that suggested intoxication.

Dillard instructed defendant to perform several sobriety tests, including a one-leg stand, a finger count test, an alphabet test, and a number counting test. Because he believed that defendant's performance on these tests indicated

intoxication,[1] Dillard asked defendant to submit to a preliminary chemical breath analysis test (PBT). After defendant registered 0.11 percent on the PBT, Dillard placed her under arrest for operating a motor vehicle under the influence of intoxicating liquor. Dillard then transported defendant to the Ferndale police station, where he administered two Breathalyzer tests. On both tests, defendant registered a blood alcohol content of 0.12 percent.

The prosecutor charged defendant with one count of operating a motor vehicle while under the influence of intoxicating liquor/unlawful blood alcohol level (OUIL/UBAL), M.C.L. § 257.625(1); M.S.A. § 9.2325(1). In the district court, defendant moved to suppress the results of the roadside sobriety tests, the PBT test, and the Breathalyzer test, arguing that the police officer lacked a proper basis for instructing her to get out of her vehicle and perform the sobriety tests. The district court granted defendant's motion to suppress the relevant evidence and dismissed the charge against her, reasoning as follows:

> Just a bad smell without asking any questions like where are you coming from[,] a bar? Did you have any alcohol? Without any of that and without bad driving and without the fumbling that you sometimes see and without testifying--I didn't hear there was

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[1] According to Dillard, defendant failed the field sobriety tests in the following particulars: (1) while performing the one-leg stand, defendant's balance was shaky and she put her foot down sooner than instructed, (2) on the finger count test, defendant counted forwards instead of backwards, (3) on the alphabet test, defendant's speech was slurred and she paused for approximately one minute between letters T and U, and (4) on the number count test, defendant miscounted and repeated numbers.

> blood shot eyes; I didn't hear anything else as typically testified to for justifying giving the field sobriety test, and if there's no justification for giving [the] field sobriety test there's no justification for the PBT, and there's no justification for the breathalyzer. Motion is granted.

The prosecutor appealed the district court's decision to the circuit court, which affirmed. Applying a standard of review de novo, the circuit court concluded that the strong odor of intoxicants, standing alone, did not provide the police officer with reasonable cause to instruct defendant to get out of her vehicle and perform roadside sobriety tests.[2]The prosecutor appeals to this Court by leave granted. We reverse and remand for further proceedings consistent with this opinion.

Generally, this Court will not disturb a trial court's ruling at a suppression hearing unless that ruling is clearly erroneous. People v. Burrell, 417 Mich. 439, 448, 339 N.W.2d 403 (1983). "However, the underlying issue before us is 'the strict application of a constitutional standard to uncontested facts. Application of constitutional standards by the trial court is not entitled to the same deference as factual findings.' " People v. Bordeau, 206 Mich.App. 89, 92, 520 N.W.2d 374 (1994), quoting People v. Nelson, 443 Mich.

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[2]The circuit court's opinion is somewhat unclear with respect to what standard the court applied to the police officer's conduct. Although the circuit court referenced the requirements of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and discussed whether the police officer had reasonable cause to order defendant out of the vehicle, the court concluded its analysis by stating that "[t]he smell of intoxicants alone is not sufficient probable cause to administer field sobriety tests and PBT." [Emphasis added.]

626, 631, n. 7, 505 N.W.2d 266 (1993). Accordingly, we decide this constitutional question de novo.

In People v. Christie (On Remand), 206 Mich.App. 304, 308, 520 N.W.2d 647 (1994), this Court explained the standard applicable to a police officer's investigative stop of a criminal suspect:

It is well established that brief investigative stops short of arrest are permitted where police officers have a reasonable suspicion of ongoing criminal activity. Terry v. Ohio, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); People v. Faucett, 442 Mich. 153, 168, 499 N.W.2d 764 (1993). The totality of the circumstances test is to be used in cases involving investigative stops. Id., citing United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). The Cortez Court warned against overly technical reviews of a police officer's common-sense assessment of the probability that criminal activity is afoot. Faucett, supra at 168, 499 N.W.2d 764.

In determining whether the police officer's suspicion for making the investigative stop was reasonable, "[c]ommon sense and everyday life experiences predominate over uncompromising standards." Nelson, supra at 635-636, 505 N.W.2d 266. Deference should be given to the police officer's experience and the known patterns of certain types of lawbreakers. Id. at 636, 505 N.W.2d 266. In People v. Champion, 452 Mich. 92, 98, 549 N.W.2d 849 (1996), our Supreme Court further explained the reasonable suspicion required in order to justify a Terry investigative stop: "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause."

If an investigative stop of an automobile is proper, the officer is "permitted to briefly detain the vehicle and make reasonable inquiries aimed at confirming or dispelling his suspicions." People v. Yeoman, 218 Mich.App. 406, 411, 554 N.W.2d 577 (1996), citing Nelson, supra at 637, 505 N.W.2d 266. In this case, the state police trooper properly stopped defendant's vehicle for the defective equipment violation. However, defendant contends that a second investigative stop occurred when the officer instructed her to get out of the vehicle and perform the roadside sobriety tests. As a result, defendant argues that the second stop must be analyzed separately to determine whether the police officer complied with the requirements of Terry, supra. We agree.

In Burrell, supra, our Supreme Court considered a similar factual situation. In that case, the defendants' vehicle was properly stopped for a defective equipment violation. While investigating that violation, the police officers began to suspect that the vehicle was stolen, and detained defendants while seeking further information about the suspected crime. Our Supreme Court treated this factual situation as involving two separate detentions, the first involving the defective equipment violation and the second involving the suspicions that an unrelated crime had been committed. The Court explained that such a subsequent detention, after a legal stop of a vehicle, must be analyzed under the Terry standard:

> However, since a stop almost inevitably leads to a brief detention for questioning, we draw guidance from these decisions as to the standard applicable to a brief detention on an unrelated matter following an otherwise lawful stop. Proceeding from the premise that a brief detention is at least as intrusive for Fourth Amendment purposes as a stop, we conclude that a brief detention for questioning is permissible if based

> on a reasonable and articulable suspicion of criminal activity. [Burrell, supra at 456-457, 339 N.W.2d 403 (emphasis in original).]

Burrell is helpful in deciding the present case because that decision makes clear that a police officer need not turn a blind eye to new indications of criminal activity that he observes after stopping a motor vehicle for an unrelated matter. If the officer's new observations support a reasonable, articulable, and particular suspicion that criminal activity is afoot, the police officer is permitted to take those circumstances into account during a brief detention, to either confirm or dispel the new suspicions. Id.

In this case, when Dillard conversed with defendant through the vehicle's open window, he detected a strong odor of intoxicants on her breath. At that point, the focus of his investigative stop changed from the defective equipment violation to a suspicion that defendant may have been operating a motor vehicle while under the influence of intoxicating liquor. Because this suspicion was unrelated to the reason why Dillard had initially stopped defendant's vehicle, we must analyze these facts as presenting two separate detentions. Defendant concedes that the first detention, the stop for the defective equipment violation, was justified under Terry. Therefore, the question presented is whether the second detention in this case was justified under that standard. In order to make that determination, we must decide whether the strong odor of intoxicants on a motorist's breath, standing alone, can provide a police officer with a reasonable, articulable, particularized suspicion that the motorist was driving while under the influence of intoxicating liquor. We believe that it does.

First, the prosecutor relies on an unpublished decision of the Wisconsin Court of Appeals, State v. Franson-Hopka, 181 Wis.2d 1005, 513 N.W.2d 708 (1994), for the proposition that the odor of intoxicants is sufficient to create a reasonable suspicion that a motorist has been driving while intoxicated, and justifies a police officer's decision to require roadside sobriety tests. However, we agree with defendant that the Wisconsin case is factually distinguishable from the present case. In Franson-Hopka, a police officer observed a vehicle being driven in the evening hours with only one operational headlight. The officer stopped the vehicle for this defective equipment violation. While speaking with the defendant, who was driving the vehicle, the officer noticed a strong odor of intoxicants on her breath. He questioned the defendant about the odor and she admitted that she had been drinking wine at a nearby restaurant. Additionally, the defendant spoke so softly that the police officer could not understand much of her explanation. The officer then instructed the defendant to get out of her vehicle and perform roadside sobriety tests.

On these facts, the Wisconsin court held that the police officer had a reasonable suspicion of intoxication under Terry, supra, sufficient to justify his request that the defendant perform roadside sobriety tests. However, the police officer in Franson-Hopka observed factors indicating the possibility of intoxication, in addition to the strong odor of intoxicants on the defendant's breath. Therefore, we do not find that decision helpful in determining whether the strong odor of intoxicants, standing alone, is sufficient to create a reasonable suspicion that the driver is intoxicated.

The prosecutor also relies on the language of M.C.L. § 257.625a(2); M.S.A. § 9.2325(1)(2) to justify the police

officer's actions in this case. At the time of defendant's arrest, the statute provided:[3]

> A peace officer who has reasonable cause to believe that a person was operating a vehicle upon a public highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state and that the person by the consumption of intoxicating liquor may have affected his or her ability to operate a vehicle ... may require the person to submit to a preliminary chemical breath analysis administered pursuant to this subsection.

We do not believe that the statute is helpful in resolving the present issue, because it addresses when a police officer may require a motorist to submit to a PBT test. The statute's plain language does not address when a police officer may require a motorist to perform roadside sobriety tests. In this case, defendant challenged the officer's initial instruction that she get out of the vehicle and perform the sobriety tests.

Next, the prosecutor argues that police officers have the inherent authority to order a motorist out of a vehicle during routine traffic stops for the officers' safety, without any reasonable suspicion that the motorist had committed a crime. Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); People v. Harmelin, 176 Mich.App. 524, 526, 440 N.W.2d 75 (1989). Because Dillard's testimony contained no suggestion that he instructed defendant

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[3]Although the statute was amended by 1998 P.A. 350, effective October 1, 1999, those amendments did not materially alter this subsection.

to get out of her vehicle for safety reasons, or that he ever entertained concerns about his own safety, we do not believe that this reasoning supports the police officer's actions in this case.

Finally, the prosecutor argues that the strong odor of intoxicants on a motorist's breath, standing alone, provides a police officer with a reasonable suspicion that the motorist has consumed intoxicating liquor. Defendant counters with two basic arguments why such an odor should be deemed insufficient to provide a police officer with reasonable suspicion. First, defendant argues that such an odor might be created by the consumption of desserts, candy, or mouthwash containing trace amounts of alcohol. On this point, we note Dillard's testimony at the suppression hearing that defendant's breath smelled strongly of intoxicants. Giving deference to the officer's experience and common sense, Nelson, supra at 635-636, 505 N.W.2d 266, we disagree that consumption of the items listed by defendant would likely produce the type of strong odor that the officer encountered in this case. We believe that it is altogether reasonable for a police officer to suspect that the strong smell of intoxicants on a motorist's breath was caused by the consumption of intoxicating liquor.

Defendant next argues that the odor of intoxicants on a motorist's breath does not necessarily mean that the motorist's blood alcohol content exceeds legal limits.[4] While we agree with defendant on this point, we nevertheless hold that such an odor may give rise to a reasonable suspicion that the motorist has recently consumed intoxicating liquor, which

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[4]Dillard admitted at the suppression hearing that he could not determine, solely on the basis of the strong odor of intoxicants on defendant's breath, whether her blood alcohol content exceeded legal limits.

may have affected the motorist's ability to operate a motor vehicle. A police officer need not suspect that a motorist's blood alcohol content is above or below a certain numerical limit before conducting roadside sobriety tests. Rather, he merely must have a reasonable suspicion that the motorist has consumed intoxicating liquor, which may have affected the motorist's ability to operate a motor vehicle. In order to confirm or dispel such reasonable suspicions, we hold that a police officer may instruct a motorist to perform roadside sobriety tests.

Defendant next argues that the police officer could not have developed a reasonable suspicion that she was operating a motor vehicle while under the influence of intoxicating liquor unless he visibly observed indications that she was driving while intoxicated, such as swerving, crossing lane markers, or other similar conduct. To support her contention, defendant relies on the language of the OUIL/UBAL statute, M.C.L. § 257.625(1); M.S.A. § 9. 2325(1), and the criminal jury instructions, C.J.I.2d 15.3. Defendant is incorrect. A motorist may be convicted of OUIL/UBAL if the motorist either operated a motor vehicle while under the influence of intoxicating liquor or operated the vehicle while having an unlawful blood alcohol level. M.C.L. § 257.625(1); M.S.A. § 9.2325(1); C.J.I.2d 15.3. Further, a "defendant may be convicted of OUIL even if he is observed driving in a normal fashion." People v. Crawford, 187 Mich.App. 344, 350, 467 N.W.2d 818 (1991), citing People v. Walters, 160 Mich.App. 396, 402-403, 407 N.W.2d 662 (1987). Therefore, defendant's argument fails.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

APPENDIX F

Motion to Suppress Transcript
STATE OF MICHIGAN
IN THE 46TH DISTRICT COURT
FOR THE COUNTY OF OAKLAND

Case No. 98 M 351734 A

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

vs

MARY NANCY RIZZO,
Defendant.

Defendant's Motion to Suppress Transcript

Proceedings had before the Honorable SUSAN M. MOISEEV, Judge of the 46th District Court, on Tuesday, December 15, 1998, Southfield, Michigan.

APPEARANCES:
ROBERT GILES
1200 North Telegraph Road
Pontiac, Michigan 48053
Appearing on behalf of the People of the State of Michigan

JAMES FEINBERG
2632 Buhl Building
Detroit, Michigan 48226
Appearing on behalf of Mary Nancy Rizzo

46th District Court
Tuesday, December 15, 1998
At or about 11:45 a.m.

THE COURT: The matter of people of the State of Michigan versus Mary Rizzo, 98 M 35734A.

MR. GILES: Robert Giles on behalf of the People.

MR. FEINBERG: James Feinberg attorney for Ms. Rizzo.

Your Honor, I would aks if there's a potential for more than one witness to be testifying that they be sequestered.

MR. GILES: No objection, Your Honor. People would call – if I may call my first witness Trooper Dillard to the stand.

THE COURT: Raise your right hand, please. Do you solemnly swear or affirm the testimony you're about to give s the whole truth and nothing but the truth?

TROOPER DILLARD: I do.

THE COURT: Have a seat on the witness stand, please.

DENNIS DILLARD , having been duly sworn to tell the truth and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GILES:

Q Good afternoon, Trooper. State your name and spell your last name for the record.

A Yes. Dennis Dillard D-i-l-l-a-r-d.

Q What's your occupation?

A I'm a Michigan State Police road trooper.

Q Were you so employed on August 28, 1998?

A Yes, I was.

Q Were you working on that date at approximately 12:40 in the morning?

A Yes, I was.

Q What were your duties on that date?

A On that day just regular routine patrol.

Q Were you riding alone? Or were you with a partner?

A I was the driver of the patrol vehicle.

Q What type of vehicle?

A Fully marked patrol vehicle. State Police vehicle with a red light on top and wigwag headlight.

Q On that date and at that approximate time, were there any vehicles that caught your attention?

A Yes.

Q Why?

A The vehicle that caught my attention was a Geo Prizm, blue in color had a broken right taillight which was showing white light to the rear.

Q Where did you see the vehicle?

A The vehicle was entering southbound M39. The southbound Southfield Freeway from the southbound Lodge Freeway exchange.

Q What city or township?

A City of Southfield.

Q Okay. According to your knowledge – how long have you been a state trooper?

A Just over thirteen years.

Q Okay. According to your knowledge, is there any violation of state law to have broken taillights showing white?

A Yes, it is. It's defective equipment violation.

Q Did you stop the vehicle?

A Yes, I did.

Q All right. Where did you stop that vehicle?

A As I recall, I stopped the vehicle on the right shoulder of the southbound M39 just north of Eight Mile Road.

Q Okay, City or township?

A Still city of Southfield.

Q Okay. How did you stop the vehicle?

A I stopped the vehicle by activating the patrol emergency equipment red light and the wigwag light to direct the vehicle over to the right shoulder. Also using spotlights which were in the – located on the driver side and passenger side of the vehicle.

Q This vehicle, did it stop right away?

A It took approximately, as I recall, about twenty seconds to stop. It didn't stip right away like in my past experience vehicles normally pull over immediately right after the light comes on. It took approximately twenty seconds for the vehicle to stop.

Q When you say it took approximately twenty seconds when you activated your lights, were you before or after Eight Mile?

A The best of my recollection at this time we were north of Eight Mile Road.

Q And when the vehicle came to a stop, were you north or south of Eight Mile, if you remember?

A To be honest with you, I don't really recall at this time.

Q Did you – how may occupants were in the vehicle?

A Just one.

Q Did you approach that individual and speak with them?

A Yes.

Q Do you see that individual in court today?

A Yes, I do.

Q Point to he or she and describe an article of clothing they may be wearing.

A She's sitting to your left at the defense table wearing a red coat, long brown hair.

MR. GILES: May the record reflect identification of the defendant?

THE COURT: Yes.

Q did you speak to the defendant at this time?

A Yes, I did.

Q Did you ask here about the taillight she had on the back of her car?

A Yes, I did.

Q What was her response?

A Well, first of all I identified myself; advised her – requested her license, registration and insurance. At which time I then advised her I was stopping her for the broken taillight which is showing white light to the rear. She advised me that the light had been broken approximately two weeks ago when the vehicle was parked in front of her brother's house, I believe, in the city of Farmington Hills.

Q Okay. And when you spoke to her, did you notice anything unusual about her?

A I detected a strong odor of intoxicant on her breath at that time.

Q When you notice that, what did you do?

A I then asked her to step from the vehicle so I could check her further and possibly perform sobriety tests with her at that time.

Q Okay. And you did ask her to perform some field sobriety tests?

A yes.

Q Do you recall which one you had her to perform?

A I asked her to perform the one leg stand, the finger count test, a A,B,C test alphabet test, and a number count test.

Q Let's start with the A,B,C's. Do you recall what her performance as on that test?

A I know that her speech was slurred, and as far as the order that she gave them in I would have to look at the report to refresh my recollection to give exactly what she gave at the time.

MR GILES: May I approach the witness, Your Honor.

THE COURT: Yes.

Q Okay. How did she perform on the A,B,C?

A On the A,B,C test she recited the letters from A to T. She hesitated for approximately a minute and then recited the letters U,V,W,X,Y,Z and stopped.

Q Okay. Next then counting backward. What numbers did she count from?

A I had her start from one hundred to count back to eighty. At which point she counted down to the number from one hundred to eighty six. Then recited eighty six, eighty five, eighty four, eighty six again, and then counted eighty three, eighty two, eighty one, and eighty.

Q Okay. What w the next test you asked her to perform?

A The next test would have been the finger count test.

Q And did you describe this to her?

A I described it, and also demonstrated it for her.

Q Did you describe all these tests to her?

A Yes, I did.

Q Prior to asking her to take these tests, did you ask if she understood English?

A Well, I asked her if she understood what I had asked her to do, and she told me yes.

Q Okay. Did you ask if she had an physical impairments that would prevent her from performing any of these tests?

A Yes I did.

Q Did she indicate she had any impairments?

A No, she did not.

Q Okay. After you demonstrated the count on the fingers, did you ask her to perform that test?

A Yes, I did.

Q Was she able to perform that test properly?

A Not properly, no.

Q How did she perform it improperly?

A Well, she counted on her fingers. I had instructed her to do the tip of her thumb to the finger. I told her to count forward one to four and then backward – I'm sorry. Forward from one to four and then backwards four to one which would have been in reverse. I asked her to do that two times for me.

Q How did she perform it?

A She counted one to four going forward and also one to four going backward which was the incorrect way I had asked her do.

Q So she went one, two, three, four; one, two, three, four?

A That's correct.

Q Okay. Thank you. What was the next test you asked her to perform?

A The one leg stand test.

Q Okay. And how did she perform on that?

A Her - I asked her to count from one thousand one to one thousand thirty while standing on one leg. During that time, her speech was slurred. She was able to do the test on the count of one thousand and twenty at which time she put her foot down and stopped which was ten counts too soon at that time.

Q And were you able to observe her balance?

A Her balance was at that time a little shaky, but she was able to keep her foot up at that point. Somewhat. Only thing I know at the time she put her foot down too soon that was may main indication.

Q All right. And based on these field sobriety tests that you asked her to perform, did you ask her to take a breathalizer test? Did you ask her to perform a - withdraw all those questions. Did you ask her to take a preliminary breath test?

A Yes, I did.

Q And are you aware of administrative rules with regard to the administering of breath tests?

A Yes.

Q And did you follow those rules?

A Yes, I did.

Q Okay. What did you do that makes you feel you followed those rules?

A Well, I advised her of what the test was. I indicated to her what the test was; that it was a test a field sobriety test on the road. Advised her to – well, I advised that she didn't have to take the test if she didn't want to, if she didn't take the test that it wasn't something that could be used in court against her at that time. So at that point, she advised me that she would take the test, and she did take the test, and the results being 0.11 percent at the time.

Q When you got that reading, what did you do?

A Advised her that she was under arrest for operating under the influence of intoxicating liquor; place handcuffs on her; and placed her in the patrol car.

Q Okay. Where did you take her at that point?

A We took her to the Ferndale Police Station being that we are able to lodge with them and do breathalizer tests with them without any type of complications or whatever that is a place that we normally go right now.

Q Are you familiar with a datamaster test?

A Yes, I am.

Q Are you a licensed operator for that?

A yes, I am.

Q Did you take all the pre-requisite courses to become a licensed operator?

A Yes, I did.

Q When did you do that?

A Approximately five years ago.

Q And have you had a to take any continuing classes since then?

A I've had some refresher updates and things of that nature, but nothing –

Q Do you have your license or your card with you?

A No, I don't. It's at the post.

Q Okay. But we can get it?

A I can get it, if I had to. I came fro home. I'm sorry.

Q That's okay. When you arrived at the Ferndale Police Department, what's the first thing you did when you get there?

A The first thing we do is we take the prisoner to the check-in counter where an officer there will get the prisoner information name so forth, and begin to take the property, to lot it in; and then at that point I took the prisoner to the breathalizer room and prepared to give her the sobriety test of the breath test.

Q Are you familiar with the fifteen minute waive period?

A Yes.

Q You're familiar that's the statutory requirement?

A Yes.

Q For admission of a datamaster result, did you perform that in this matter?

A Yes, I did.

Q Okay. And do you recall what time you began your fifteen minute – observation?

A At approximately 1:15 a.m.

Q Okay. And prior to taking the individual back to the room, – withdraw that question. Where were you when you did this fifteen minute observation?

A Well, it was at the – well, it's starting at the counter. The whole time. I brought the prisoner in, and also in the process of taking her to the breathalizer room, and then at that time preparing paperwork and things that need to be done while I was waiting.

Q And during that time, did you observe if she put her hand in her mouth?

A No, I did not.

Q Did you see if she belched?

A Yes, I didn't notice her belching.

Q You did not notice her belch?

A No.

Q Did you see her regurgitate?

A No, I did not.

Q Did you see her place anything in her mouth?

A No, I did not.

Q Did you advise her of what was known as chemical test rights?

A Yes, I did.

Q I'm going to approach you with what's been marked as People's Number 1. Do you recognize this?

A Yes, I do.

Q I've shown defense counsel a copy of that, and I've also given him a xerox copy. Do you recognize that document?

A Yes, I do.

Q Where did you last see that document?

A Attached to the official police report which was at the State Police Post.

Q Who created that document?

A I did.

Q What's the purpose of that document?

A The purpose of the document is to record the defendant's results and to document the instrument that was used and the results of the test. Also, to enter this information into the lien system.

Q All right. Is there anything on the back of that document?

A Yes.

Q What's on the back of that document?

A The chemical test rights that I read to the defendant.

Q All right. Is there a number to that document?

A I'm sorry?

Q Is there a document number like an ID number?

A Only the one that we would write on the front that would be the only indication.

Q Well, actually what I'm looking for is like a –

A Oh, yes. DI177.

Q Thank you.

MR. GILES: Your Honor, People would move to admit People's Exhibit Number 1.

MR. FEINBERG: No objection.

Q The rights that are on the back of that document did you read those to the defendant?

A Yes, I did.

Q And did you give her a chance to look at that document?

A I don't recall giving her a chance to look at it, no.

Q Did she agree to take the test?

A yes, she did.

Q Now I notice on there there are some options in terms of blood, urine, or breath.

A That's correct.

Q I also notice that one of those are circled. Did you give the defendant that document to circle and consent to take any of those tests?

A No, I did not.

Q But she did verbally express that she would take a test?

A Yes.

Q Are you familiar with datamaster logs?

A Yes.

Q And what are the purpose of those?

A To keep a accurate recording of the datamaster. To make sure it's working properly. Also to keep a record of the similarly tests that are done. I think once a week they have to be done.

MR. GILES: May I approach the witness?

THE COURT: Yes.

Q Let me hand you what's been marked a People's Proposed 2. The Ferndale station that you took the defendant to is that the station that you work out of?

A No, it isn't.

Q What post do you work out of?

A Michigan State Police Metro North Post 14350 Ten Mile Road, city of Oak Park.

Q What were – People's Exhibit Number 2, where are those logs from?

A These are from the Ferndale Police Department.

Q Is that the same datamaster you took the defendant to have the test taken on?

A Yes.

Q Okay. I notice you just compared People's Exhibit 2 to People's Number 1 – People's Proposed Exhibit. Why did you do that?

A To locate the instrument number to confirm the instrument number that I wrote down. DI177 with the datamaster log from the Ferndale Police Department.

MR. GILES: At this time, I believe the defense counsel has stipulated to admission of these datamaster logs for the purpose of this hearing only.

MR. FEINBERG: No objection.

MR GILES: Thank you.

Q Do you know if the hundred and twenty test – does People's Proposed Number 2 reflect whether or not the instrument has been given inspection every hundred and twenty days?

A Yes.

Q Okay. And the weekly simulated test for the month of August which is when this – in the month of September actually. Let me withdraw all of that. People's Exhibit Number 2, how man pages is in that?

A I have to count them here. Twelve pages.

Q Okay. And are those the datamaster logs for the year 1998 basically?

A Yes, it is.

Q Okay. Would you refer to August and September and tell me if the weekly simulator test were done on that day.

MR. FEINBERG: What was that?

MR. GILES: August and September.

A Yes, they were.

Q Thank you. After observing the defendant for fifteen minutes and seeing that she hadn't put her hand in her mouth or put anything in her mouth or regurgitated or belched, did you perform a datamaster test on the defendant?

A Yes, I did.

Q Okay.

Your Honor, if I may approach the witness with People's Exhibit Number 3?

THE COURT: Yes.

Q You recognize that?

A Yes, I do.

Q What is that?

A This is a OD80 form which is used in the datamaster breath machine – or instrument excuse me.

Q Okay. And did you create that document?

A Yes, I did.

MR. GILES: People seek to admit People's Proposed Number 3.

MR. FEINBERG: No objection.

Q Is your signature on there?

A Yes, it is.

Q And is that – is the defendant's name on there?

A Yes, it is.

Q All right. What are the results of those – of that ticket?

A The results of the first sample taken which was at 1:37 a.m. was .12, and the second test which was taken at 1:38 a.m. is also a .12.

Q Thank you, Trooper.

MR. GILES: At this time, the People have nothing further.

THE COURT: Cross examination?

CROSS EXAMINATION

BY MR. FEINBERG:

Q Trooper Dillard, you stopped Ms. Rizzo at 12:40 a.m. on the Southfield Freeway?

A Approximately, yes, sir.

Q Well when you say approximately, give or take a minute?

A Exactly.

Q Okay. So as close to 12:40 a.m. as possible?

A Correct.

Q Okay. And you indicated that the reason that you asked her out of the car was not because she had been driving in a way that would make you think that she was intoxicated, it was because of the odor of alcohol from her breath; is that correct?

A Correct.

Q So there were not driving conditions that caused you to think that she was intoxicated; is that correct?

A That's correct.

Q Okay. This was summertime?

A Yes.

Q Correct?

A Yes.

Q And her window was open? The passenger window open when you were talking to her?

A The driver window.

Q I mean the driver window.

A As I was talking to her, yes.

Q Was the passenger window open?

A I don't recall the passenger window being open, no.

Q And how far would you say you were from her while you were talking to her?

A Approximately a foot to eighteen inches give or take within that range.

Q Okay. Now being a police officer or law enforcement officer for thirteen years, did you ever do any training as far as the strength of the odor of alcohol as it relates to the amount of alcohol someone has consumed?

A I haven't had that type of training, no.

Q Okay. SO you don't know whether or not an odor of alcohol is, in fact, a legal limit or an illegal limit from smelling?

A No, not from smelling, no.

Q Okay. When you were talking to her and you asked her fore her license, registration, and proof of insurance, did she comply and five you what you requested?

A Yes, she did.

Q Okay. There was no misunderstanding at that particular time about what you were saying?

A Correct.

Q Okay. And when she gave it to you, did you have an opportunity to look at it and see what was on it?

A Yes.

Q Okay. Was everything proper?

A Best as I can recall, yes.

Q Okay. And while she was in the car, you explained to her – did she ask you why she was stopped? Or you just explained to her?

A Did she ask me? No, I just explained it to her.

Q Okay.

A I just make a habit of doing that.

Q And did she appear to understand what you were saying to her?

A yes.

Q Okay. Now you smelled alcohol, correct5?

A Well, I smelled intoxicants which would indicate to me that there was some alcohol involved.

Q I see. When you say you smelled intoxicants, –

A Yes.

Q – it wasn't an alcohol odor?

MR. GILES: Objection, that's asked and answered, Your Honor.

Q What's the difference between the odor of intoxicants and the odor of alcohol in this case?

MR. GILES: Well, objection. I think it's (a) irrelevant, and (b) asked and answered. He's testified that he smelled intoxicants. He didn't testify he smelled alcohol.

MR. FEINBERG: Well, this is a cross examination.

THE COURT: That's what he's clarifying. So I'll allow it.

Q When you say smelling intoxicants, you are saying you did not smell the odor of alcohol?

A From my understanding the odor of alcohol is hard to detect within itself. The odor that I smelled was a type of some type of say a drink of some type which could indicate it could be some of anything. I don't know which. I couldn't tell you what she had exactly. It just

indicated to me that there could have possibly been some type of drinking involved.

Q So she gave you no appearance while you were talking to her of being intoxicated; is that correct?

A The appearance, no.

Q Okay. And her driving gave you no appearance of being intoxicated?

A At the time, you right, correct.

Q And her compliance with what you requested gave you no idea that she was, in fact, intoxicated?

A Correct.

Q Okay. Based on that and the odor of something that may have alcohol related, you ordered her out of the car onto the street to do afield test?

A Correct.

Q Okay. Now you asked her to do a PBT; is that correct?

A Correct.

Q Does it indicate any where in your report the time that you requested her to do the PBT?

A No, not in the report, no.

Q Now the form, I believe, is it People's Exhibit Number 1. You have that? The breath, blood, urine test report?

A Yes.

Q Okay.

A DI177.

Q Right. Where was that filled out at the station or on the street?

A Probably, as I recall, in the station.

Q Okay.

A Best I can recall, is in the station.

Q That's your normal –

A Normal procedure.

Q You give the field test? You give the PBT test? You put the person in the car? You drive them to the police station, and then you start doing the paperwork?

A Correct.

Q And it says breath test operator number 09070; is that you?

A That's my number, yes.

Q That is not the same as your badge number?

A That's correct. It's a separate number altogether.

Q So you're the same person – 368 badge number is the same as 09070 operator number?

A Right. That's my breath operator number.

Q Okay. Does it indicate – well, let me ask you this: How long do you think that it took you from the scene after the PBT test was done and you had Ms. Rizzo for you to get from there to the Ferndale Police Department?

A I'd say approximately twenty to twenty five minutes.

Q Does it indicate any where on this report when you read Ms. Rizzo her chemical right test – or chemical rights?

A Yes.

Q And what time?

A 12:55 a.m.

Q You stopped Ms. Rizzo at 12:40 and by 12:55 you're already at the Ferndale Police Department reading her her chemical rights test? Would that be correct based on the times that you put in the report?

A No, that wouldn't be correct, no.

Q It would not be correct?

A No.

Q How did the 12:40 – how did you come to the 12:40 time period?

A That was approximately the time of the stop.

Q Okay. And on the back page of People's Number 1you have breath test read by Trooper Dillard at 12:55 a.m.?

A Correct.

Q Correct?

A Correct.

Q That's on the report?

A Right.

Q Okay. And the rights were read at the station at the Ferndale Police Department?

A No. The rights were read in the patrol vehicle at the scene.

Q I see. So was it before she was cuffed?

A No, this was after she was handcuffed and place in the car. She was already under arrest. The chemical rights were read after she was under arrest.

Q Okay. So she was already cuffed, right?

A Correct.

Q And put in the scout car. You were – then what you went into the scout car an this was done while you were driving?

A No, just before we left the scene.

Q Okay. Now how did you make a determination that it was 12:55?

A Approximate time.

Q I mean you looked at your watch?

A Correct.

Q Okay. And from the time that she finished her PBT test to the time that she was handcuffed; put into the scout car; you got into the car; took out the chemical rights and read it to her, how much time do you think lapsed?

A Approximately – you mean from the time of the original stop?

Q No, no. She took the PBT test?

A Correct.

Q At that point and time, you make a determination that you were arresting Ms. Rizzo, correct?

A Correct.

Q You arrested her?

A Yes.

Q At that point, you handcuffed her?

A Yes.

Q Put her into the scout car?

A Correct.

Q Made arrangements – did you then make arrangements on the – on your radio to have her car picked up and towed?

A My – as I recall, my partner had already done that while he was in the car. I was outside the car with Ms. Rizzo. He was in the car making those arrangements.

Q So she's handcuffed, Ms. Rizzo? You put her in the back seat of the car, correct?

A Correct.

Q And then you went to your car? Got this form and read it to her?

A Correct.

Q Okay. What I'm asking is from the time of the conclusion of the PBT test up until the time that your read her the rights, how much time lapsed?

A About two to three minutes. Maybe four minutes.

Q Some where between two to four minutes?

A Right.

Q Okay. Do you know what the purpose of that fifteen minute observation period is? Why is there a fifteen minute period?

A Well, to watch the subject to make sure that they don't put anything in their mouth. They don't regurgitate or have anything in their mouth that would cause the test to be inaccurate.

Q How about a belch? Would that have caused –

A It could cause – I'm not an expert on that. I mean it could cause something like that.

Q I mean that's one of the things you've read in your materials that could cause a rise or an inaccuracy of the test?

A I don't recall that, no.

Q Well, why would they want you to watch to see if there's a belch if it wouldn't effect the result of the test?

MR. GILES: Calls for speculation.

MR. FEINBERG: No, it calls for his experience and expertise of being a breathalizer operator, a datamaster operator.

THE COURT: I'm going to sustain the objection.

MR FEINBERG: Okay.

Q Are you aware there's a fifteen minute – the observation period before you give a PBT test?

A Yes.

Q Okay. According to your time period, you were any where from two to four minutes short of observation before you gave a PBT test – when you gave Ms. Rizzo her PBT test; is that correct?

A Could you repeat that again, please?

Q Yes. According to your time period, you were any where from two to four minutes shy of the fifteen minute requirement to observe Ms. Rizzo before you gave her a PBT test; is that correct?

A Well, from the time that the stop was made approximately 12:40 I would agree it would be maybe two or three minutes shy of that, yes.

Q Okay. So now you take Ms. Rizzo to the Ferndale Police, correct?

A Yes.

Q And do you now what time you got to the Ferndale Police Station?

A Approximately. I mean it would be approximately a little after 1 o'clock. I don't know exactly the exact time.

Q Well, based on your testimony before you started driving from the Southfield Freeway from the point of Ms. Rizzo's arrest, you read her her rights at 12:55?

A Correct.

Q Okay. And you said it took some where between fifteen and twenty minutes to get from where you were to the Ferndale Police Department, correct?

A I don't recall saying fifteen, twenty minutes to get to the Ferndale Police Department.

Q I asked how long it took you to get from the Southfield Freeway where you were to the Ferndale Police Department and you said some where between fifteen and twenty minutes.

A I don't recall saying that.

Q How long does it take you to get from Southfield Freeway at Eight Mile Road to the Ferndale Police Department?

A It takes approximately I'd say about maybe ten minutes going straight down Eight Mile Road from the Southfield Freeway from the Southfield Freeway up to Eight Mile Road and Woodward and right into Nine Mile. It doesn't take that long.

Q You do not remember saying fifteen to twenty minutes?

A I don't recall saying fifteen to twenty minutes to get there, no.

Q But it's at least ten minutes maybe more?

A It could be depending on the traffic situation and so forth you know in the police car.

THE COURT: You go there with light and sirens?

THE WITNESS: No.

Q When you got to the Ferndale Police Department, the first thing you did was go to the booking desk, right?

A Correct.

Q And do you have anything in your possession that indicates the first time the booking officer wrote down as you presenting Ms. Rizzo to them?

A Not that I recall. There is a copy of the booker sheet there in my report.

Q Can you –

It appears that neither the prosecutor nor I got this until today. We didn't know that this even existed until today. If I could just have a minute to look at this, Your Honor?

THE COURT: Sure.

Q Now this is filled out by the Ferndale Police officer booking –

A Yes, at the desk.

Q Let me show you this and I guess it can be marked as People's Proposed Number 4.

MR. GILES: I'm not offering it.

THE COURT: A.

Q Trooper, if you can look at this and tell me if there is a time on the sheet that indicates when you presented Ms. Rizzo to the booking desk?

A Not that I see, no.

Q Okay. So the record that you brought that does not indicate any time that Ms. Rizzo was presented to the police department?

A Correct.

Q I assume that there is a log somewhere where it's written down or do you know?

A I don't know for sure. I don't know. This is the only thing that I've gotten a copy of from their system.

Q Where did you fill out the various forms and reports? One is the DI177 the breath, blood, and urine report. Did you fill that out at the Ferndale Police Department?

A Yes. This is filled out at the Ferndale Police Department.

Q Okay. Is this prior to you giving Ms. Rizzo the datamaster test?

A This is after the datamaster test. After the results are known.

Q Okay. But I'm talking about the top part. The name, address u know stuff like that. Was that done before the test was given or after?

A It's hard to say. I don't recall exactly on that part. It's done both ways. Sometimes it's before; sometimes after. I don't recall.

Q Now what about the alcohol drug influence report. You're – I guess that's your principle report?

A Yes.

Q Is that prepared before or after the test?

A Prepared after the test.

Q Okay. Now when you first get to the police department –

A Yes.

Q – Ms. Rizzo is at the desk and she is talking to whomever the booking officer is?

A Correct.

Q Is that correct?

A Correct.

Q Now I assume it's a –

A Long desk.

Q – a long desk, and she's talking to the person, and you're some where behind her off to the side?

A Nest to her. On the side of her.

Q Okay.

MR. GILES: Who is her?

THE WITNESS: Ms. Rizzo.

Q Excuse me. And how long would you estimate the information that the booking officer took and prepared of Ms. Rizzo took?

A Approximately maybe five minutes or so. Some where in that nature. The procedure is – normally we com in with information. She's there giving her preliminary information. The booking officer takes that and types up that form while I'm back in the breathalizer room doing the test and observation with Ms. Rizzo.

Q Okay. One of the things that's done of course and what's on the sheet is a photograph. So she is – not only is information taken, but she's also photographed?

A Correct.

Q How about fingerprinted?

A No. No fingerprints.

Q Okay. Now while – okay. Then you take Ms. Rizzo to the datamaster room?

A Correct.

Q Is that correct?

A Correct.

Q And according to the report, you're observation time started at 1:15, right?

A Correct.

Q And the test started at 1:36?

A Correct.

Q The first test is a blank test and then the actual test?

A Correct.

Q During the - from 1:15 to 1:30 the fifteen minute observation period you were constantly without any interruptions watching Ms. Rizzo ace-to-face, right?

A What do you mean face-to-face?

Q Well, how can you observe to see whether or not someone belches unless you're watching them or put their hand up to their mouth? Or does something that causes whatever it is inside their stomach to come up to their mouth?

A Well, I'm not looking at them face-to-face, but I'm there with them. As far as the sitting there looking at them watching their every move, no. But I'm there doing other little paperwork, but I'm also constantly aware of them putting their hands in their mouth.

Q There's a blackboard up here. Could you draw the datamaster room and put down on there where Ms. Rizzo was, where you were, and where the datamaster instrument is.

A Okay. Let's – it's a small room. I'd say about maybe the doorway right here. A door, small room. It's a desk here. The datamaster on it. There's a chair right here where the prisoner sits right next to th desk right here. There's a chair here. I'm sitting here, and this row here is like file cabinets and such, and it's like another little temporary small individual holding cell back in here. Actually it's a very small room. It shouldn't be that big. About this big. It's a door right here. So it's like file cabinets here. I'm sitting here. Desk here. Datamaster. Prisoner sitting here. So it's like a photo camera or something. This is the door.

Q All right. Now when you come into the room, this is Ms. Rizzo?

A Right.

Q And this is you?

A Correct.

Q And this is the datamaster?

A Correct.

Q Okay. She is sitting here facing the middle of the room I assume?

A Yes. You can say that, but it's really close – it's real close.

Q I understand, but she has to be facing some where.

A Correct.

Q You're sitting here, and this is the desk that you're using to do your paperwork?

A Correct.

Q Okay. And while that fifteen minute observation period is being done, you are sitting there doing paperwork, right?

A Correct.

Q Okay. And when the fifteen minutes is up at 1:30, I assume you have some watch to let you know when the fifteen minutes are up?

A Right.

Q Then that's when you start putting in the information into the datamaster that produces the evidence ticket; is that correct?

A Correct.

Q Let me show the Court the datamaster ticket. So at 1:30 after the fifteen minute observation period you then look at the datamaster instrument and start typing in the instrument number; the date; subject's name last name, first name, middle; subject's address, city and state; subject's date of birth; license number, right?

A Correct.

Q And while you're doing that you are focusing on the breathalizer?

A Yes.

Q Because you're typing in information into the computer?

A Yes.

Q Okay. And while you're doing that while Ms. Rizzo is next to you, you couldn't tell if she burped or belched silently, if she did; isn't that right?

A Yes.

Q So for six minutes form 1:30 until 1:36 you are not observing Ms. Rizzo face-to-face; is that correct?

A Yes.

THE COURT: It takes you six minutes to put all that little bit of data in? Better get some typing lessons for you guys.

Q And then at 1:36 –

THE COURT: Six minutes after you finished whatever observations that you did even though it wasn't a constant observation because you were doing your paperwork that's when you started giving her the datamaster test; is that correct?

THE WITNESS: Yes.

Q Okay. So let me get this straight. Before th PBT you were about two to three or four minutes short of the fifteen minute observation period; is that correct?

MR. GILES: Asked and answered, Your Honor.

MR. FEINBERG: I'm getting a foundation of the question that I am going to be asking.

Q Is that correct?

MR. GILES: Asked and answered, Your Honor.

THE COURT: Come on. Let's just go, please. You guys may not have anything else to do, I got a jury coming back at 1:30, and I've been on the bench constantly since ten this morning.

MR. FEINBERG: I have no further questions at this time.

MR. GILES: I have just a couple questions, Your Honor.

REDIRECT EXAMINATION

BY MR. GILES:

Q Did you speak to the defendant prior to – ta any time prior to arresting her?

A Did I speak to her prior to arresting her?

Q Yes.

A Yes, I did.

Q Did you ask if she had consumed any alcohol?

MR. FEINBERG: Objection. It's irrelevant. Well, I'm going to object as to the time period. When was the question asked in relation this particular evening.

MR. GILES: Prior to her arrest.

MR. FEINBERG: Well, that's some where between 12:40 and 12:55. I'd like to object to a more specific foundation.

Q When did you ask that question?

A I don't recall asking her the question of drinking until after I had read her Miranda rights that's when I asked her.

Q And what time was that; do you recall?

A Approximately 1:45 a.m.

Q Okay. And you advised her of her Miranda rights?

A Yes, I did.

Q And she agreed to speak to you?

A Yes, she did.

Q What did she tell you with regard to how many beers she –

MR. FEINBERG: Objection as to what happened at 1:45. The motion goes to the arrest, the PBT, and the datamaster.

THE COURT: Yeah, sustained.

MR. GILES: Very well. Nothing further.

THE COURT: And it's outside the scope of cross.

MR. GILES: Nothing further.

MR. FEINBERG: I have no further questions of this witness, Your Honor.

THE COURT: Thank you. You may step down.

(Witnesses excused at 12:54 p.m.)

THE COURT: Any other witnesses?

MR. GILES: It's the defense's motion so –

MR. FEINBERG: I have no witnesses to put on, and apparently from this witness's testimony it was his basis of testimony that justifies either the stop, the test, and the arrest, and I'm ready to make my argument.

THE COURT: Fine.

MR. FEINBERG: Your Honor, first of all we go to the stop. The defense is not arguing that the stopping of someone with a broken taillight is improper. It is a violation of the law, and the stop was proper.

From the testimony of this particular officer or trooper there was not probable cause at the time that he ordered Ms. Rizzo out of the car to order her out of the car in a belief that an alcohol related driving offense was being committed.

He testified there was no bad driving. Everything that was requested was given to him. She understood exactly what he had asked and responded accordingly, and that the only thing that he said was he smelled the odor of intoxicants, and he couldn't even say that that was, in fact, alcohol related.

In order to order someone out of the car and to perform additional tests, you have the *Terry versus Ohio* analogy there has to be a reasonable suspicion that a crime is being committed before you can put the person through the intrusion into their person.

In this particular case there was no reasonable suspicion by this officer to believe that Ms. Rizzo was committing an illegal alcohol related driving offense. Everything that transpired after that is, in fact, a violation of the constitution, and everything must be suppressed.

Now the next time is, assuming that you do not make that particular ruling which I think is the correct ruling, you have the PBT test. The state regulations, as admitted by the officer, require a fifteen minute observation period prior to the administering of a PBT. According to the officer's own testimony this was any where from two to four minutes shy of the fifteen minute requirement as required by state law.

As to the arrest and being taken to the Ferndale Police Department this officer further testified that he is aware of the fifteen minute statute requirement of an uninterrupted observation from the time fifteen minutes prior to administering of the datamaster test.

Based on this officer's own testimony the observation period started at 1:15 to 1:30. You have by the officer's own admission this was not a constant uninterrupted observation.

He was sitting at the desk doing paperwork. He could not see whether or not Ms. Rizzo had belched or in any way brought up any kind of substance from the stomach into her mouth area.

You also have the officer testifying that from !:30 to 1:36 he entered into the computer the information that is the basis of People's Exhibit 3 which is the datamaster evidence ticket that I had showed the Court and put it on your desk. So, therefore, first I would ask that the Court based on the illegal stop – illegal arrest of Ms. Rizzo, based on the ordering her out of the car without reasonable suspicion in violation of the *Terry versus Ohio* doctrine and all the cases that came after that the entire case be dismissed. Based on everything from the ordering out of the car is tainted and all the testimony of observations of the test results of either field test, PBT, or datamaster is tainted, and, therefore, should all be suppressed.

In the alternative, the PBT and the datamaster results have to be suppressed on the basis that by the officer's own admission he did not comply with state statute requiring an uninterrupted fifteen minute observation.

MR. GILES: Your Honor, the People obviously would object. We would point out that I believe that the stip is satisfactorily. We have an officer who testified that he smelled a strong order of intoxicant coming from the defendant which that's all we would need at this time.

There are plenty of times that somebody can drive when they're intoxicated and maintain a straight line, and they can give you the information that is requested. I still believe that the smell of intoxicant at that point is enough to have the individual step out of the vehicle and perform field sobriety test.

In addition the defense counsel – and if I may approach the bench with a copy of the case – *People versus Wujkowski 1230 Mich. App. 170* which I'm sure the Court is aware of which deals with the issue that defense counsel is raising with regard to the observation period required of an individual prior to the taking of a breath test. In this case it's very similar to that case.

At hand, we have a officer who observed the individual that at times the officer's eyes were taken away from the person. However, there is no indication in that case that deals with – there's no allegation that the person every put their hand to their mouth. You know the defense counsel makes a big deal that the defendant could have belched silently. Well you know I would suggest that that also can happen when someone is looking right at you and you wouldn't know. I believe the officer in this case –

THE COURT: Their lips usually move.

MR. GILES: I'm sorry?

THE COURT: Don't your lips move?

MR. GILES: I believe the officer in this case comported with the requirements under the administrative rules, and that the results from this datamaster test would be admissible. The results with regard to the PBT. The PBT is not admissible with regarding to this trial any way so the People really have no argument with regard to that.

THE COURT: Well, but as the basis for the arrest it's not admissible and if it's not, it wasn't appropriately given then it can be used as basis for the arrest is the argument, I assume.

MR. GILES: I understand that, Your Honor, but I think there is sufficient basis even assuming this Court finds that the PBT was improperly given, and I think that in this case that performance of the defendant – the defendant's performance on the field sobriety test is an indication that there was probable cause to arrest the individual for operating under the influence or suspicion thereof to take a datamaster test. Based on that and based on the case that I provided to the Court I believe that the motion should be denied.

THE COURT: Any rebuttal argument?

MR. FEINBERG: Yes, Your Honor. *Wujkowski* was a eighteen-solid minute observation except for six seconds. We have in this case far greater. We have a six minute period for the datamaster interrupting the observation. We have a two to four minute –

THE COURT: Yeah, but in this case he walked out of the room in this *Wujkowski* case.

MR. FEINBERG: Six seconds. We're talking about six minutes of not watching. Not being able to watch. We have two to four minutes short of the fifteen minute requirement for the PBT which was, in fact, according to the officer the basis of why he arrested Ms. Rizzo.

We also have the first part I mean the strong odor of intoxicant without knowing what the intoxicant is is an insufficient reasonable suspicion based on lack of any reason to believe that the person was intoxicated. Based on compliance and understanding and driving is not reasonable suspicion to order Ms. Rizzo out, and everything thereafter must fail.

THE COURT: Well, stopping for defective equipment is obviously okay. So the stop is not problem. Testimony I heard and interesting that counsel for the People highlighted it by his questions on cross examination he went up to her he asked for driver's license and insurance. There wasn't any problem. Told her about the defective equipment. They had a conversation. The light had been broken two weeks ago in front of her brother's house in Farmington Hills which is probably ore information than she needed to offer, and that there was a strong odor of intoxicant, and based on that he took her out of the car.

He didn't ask her until after she was arrested and given Miranda rights if she had even had any alcohol to drink. So I think it failed at that level, and I'm not even going to get to whether the observation was appropriate. My guess is all the times the officer testified to were inaccurate; that it probably wasn't six minutes, and that there probably weren't those kind of gaps, but I'm not going to even get to it.

Just a bad smell without asking any questions like where are you coming from a bar? Did you have any alcohol? Without any of that and without bad driving and without the fumbling that you sometimes see and without testifying – I didn't hear there was blood shot eyes; I didn't hear anything else as typically testified to for justifying giving the field sobriety test, and if there's no justification for giving field sobriety test there's no justification for the PBT, and there's no justification for the breathalizer. Motion is granted.

MR FEINBERG: Thank you very much.

THE COURT: Case is dismissed. Would you like a formal hearing on defective equipment or will you take care of that today?

MR. FEINBERG: We can take care of that today.

THE COURT: She'll just pay it today?

MR FEINBERG: It's been fixed, the light has been fixed, and she admit the responsibility.

THE COURT: Okay.

MR. FEINBERG: Thank you very much, Your Honor.

THE COURT: Thank you.

MR. FEINBERG: Did you prepare an order of dismissal?

THE COURT: The compute will generate one.

(Whereupon matter concluded at 1:07 p.m).